No. 9106

In the United States Circuit Court of Appeals

For the Ninth Circuit

JAMES DIDIA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal From the District Court of the United States for the Western District of Washington, Northern Division.

HONORABLE JOHN C. BOWEN, *Judge.*

BRIEF OF APPELLEE

J. CHARLES DENNIS,
United States Attorney,

GERALD SHUCKLIN,
Assistant United States Attorney,
Attorneys for Appellee.

Office and Post Office Address:
226 Post Office Building,
Seattle, Washington.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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STATEMENT OF THE CASE

Appellant James Didia was indicted for a violation of Section 1304, Title 19, United States Code. The indictment contained four counts charging appellant and his codefendant, James Zagha, with the removal of labels from merchandise in their possession

showing the country of origin, which had theretofore been imported from a foreign country. The merchandise involved was made in Japan.

The gist of the charge in Count I is that appellant and his codefendant "did knowingly, wilfully, unlawfully, and with intent to conceal the information given and contained in said mark, stamp, brand and label, deface, destroy and alter the said mark, stamp, brand and label in the following manner, to-wit: by cutting from the said mark, stamp, brand and label the words 'Made in Japan' (Tr. 3)."

Counts II, III and IV charged similar offenses, except that it was charged the defendants removed the mark from the articles of merchandise involved in the respective counts.

Appellant James Didia and his codefendant were found guilty by the jury on all four counts of the indictment. Each of Exhibits 1, 2, 3 and 4 introduced in evidence by appellee refer respectively to the counts of the same number.

Appellant was manager of the New Linen Center, at 1410 Second Avenue, Seattle, Washington, and his codefendant was assistant manager (Tr. 21).

Hector C. Lende, a Customs Agent, went to the New Linen Center on March 23, 1938, and purchased

a cotton table-cloth, plaintiff's Exhibit 1. On April 11, 1938, he purchased two table-cloths, plaintiff's Exhibits 2 and 4 (Tr. 20). On the same day Customs Agent Atherton purchased doilies and placemats, plaintiff's Exhibit 3. When these articles were purchased by these agents there were no labels of origin affixed (Tr. 20 and 22).

These agents later interviewed appellant. Mr. Didia admitted the merchandise had been imported from Japan. He said he purchased Exhibit 4 from the Nippon Dry Goods Company of San Francisco, California, and Exhibit 3 from the Pilgrim Novelty Company of New York City. Didia handed them Exhibits 5 and 6 covering the items purchased from these companies (Tr. 32, 52). Appellant said evidently Exhibit 3 had been marked with a label showing the original in Japan when his company had received it and he referred to other pieces exactly the same which were properly marked (Tr. 23, 25). Didia said he didn't know who took the labels off. He further said Exhibits 7 and 8 were made in Japan (Tr. 21).

Customs Agents found 639 labels showing foreign origin in the waste-basket in the stockroom of the store, a great number of which were "Made in Japan" labels (Tr. 21, 23).

Hilda Weisfield, Assistant to the President of the Pilgrim Novelty Company, testified that the company sold plaintiff's Exhibit 3 to appellant's company; that it was made in and imported from Japan (Tr. 25, 26), and that their merchandise was cleared through Customs (Tr. 27). She stated that plaintiff's Exhibit 3 was marked with the place of origin, "Made in Japan," and the label was on there when the order was shipped. She said that if anything is not marked properly upon importation they are notified by Customs authorities. She stated further that she knew of her own positive knowledge that every piece of goods that comes out of the Pilgrim Novelty Company is labeled properly (Tr. 27).

Y. Domoto, Assistant Treasurer of the Nippon Dry Goods Company, testified that this company sold plaintiff's Exhibit 4 to the company managed by the appellant; that the merchandise was imported from the Takamura Company in Yokohama, Japan; that there was a sticker label on plaintiff's Exhibit 4 at the time it was shipped from the Nippon Dry Goods Company stating "Made in Japan" (Tr. 51). He, however, said he did not examine each piece, and that if an article comes through Customs it must have a label on it (Tr. 53).

Miss Ruth Minkove testified that she was em-

ployed as a salesgirl at the New Linen Center, where Mr. Didia was the manager, from April, 1937, until September, 1938. She said Mr. Didia and Mr. Zagha instructed the salesgirls to take labels off of Japanese merchandise. This was done until the Customs Agents came to the store. She followed those instructions, and the labels were put in the garbage. The other salesgirls did the same under the instructions of Mr. Didia and Mr. Zagha (Tr. 36).

Miss Minkove recognized plaintiff's Exhibit 1 as being merchandise sold by the New Linen Center, and that the "Made in Japan" label had been cut off with scissors pursuant to instructions. She said plaintiff's Exhibits 1 and 7 were the same quality and from the same packages and came from the same place. She said plaintiff's Exhibit 2 was merchandise from the New Linen Center, and that there had been a little gilt label pasted on the corner of the cloth stating "Made in Japan," but that it had been torn off. She said the same procedure was used as to this merchandise as was used with other articles from Japan (Tr. 38), all under the instructions of Mr. Didia and Mr. Zagha.

Plaintiff's Exhibit 4, Miss Minkove stated, was a rayon-cotton tablecloth made in Japan, and she stated that there was a label on it. The residue of the label

showed on this exhibit where it was torn off (Tr. 40, 46). This cloth was handled like the others, and the label was removed pursuant to instructions of Mr. Didia and Mr. Zagha. Mr. Didia told her that if customers made inquiries concerning the origin of merchandise, the salesgirls were to say it was made in America, or anywhere but Japan. He also told her to tell the Customs Agents that the Christmas girls took the labels off, if anything came up (Tr. 43). She further stated that, prior to April 12, 1938, the "Made in Japan" labels did not drop off, as they had all been removed prior to going out in stock (Tr. 46).

Arleen Rodgers (Tr. 46), Lenora Coogan (Tr. 47), Mary Lou Burns (Tr. 47), Rita Israel (Tr. 48), Julia Levy (Tr. 49), and Mrs. Leyton Ross (Tr. 50), all testified that they were employed, or had been employed, at the New Linen Center where Mr. Didia was manager and Mr. Zagha was Assistant Manager, and that they received instructions from both of them to remove labels from merchandise made in Japan.

THERE WAS LEGAL AND SUFFICIENT EVIDENCE UPON WHICH TO BASE THE VERDICT

The only question involved in this case is whether or not there was sufficient evidence upon which to

base the verdict of the jury. Appellant grounds his argument on the effect of an inference based on a presumption. In view of the positive and circumstantial evidence in this case we believe a discussion of this theory is unnecessary. The government has furnished strong evidence of appellant's culpability, every link of which points to his guilt.

There were no labels of origin on the articles of merchandise when they were purchased by the agents (Tr. 20, 22), (Exhibits 1, 2, 3, 4).

Didia admitted that the merchandise was made in and imported from Japan, and told them he didn't know who took the labels off (Tr. 20, 21). Exhibit 4 (Count IV), according to Domoto of the Nippon Dry Goods Company, was imported from Japan and was cleared through Customs (Tr. 51) (Exhibits 6, 14B, 15). Although he could not say that he personally examined the particular article before shipping to Didia's company, his company checked the label on each one (Tr. 53). He also said such merchandise would not be allowed through Customs unless it was properly labeled (Tr. 27). There is the residue of the label of origin on Exhibit 4 (Tr. 40). Hilda Weisfield of the Pilgrim Novelty Company testified in a like manner concerning Exhibit 3 (Count III) further stating that everything shipped by her firm was la-

beled properly (Tr. 51) (Exhibits 5, 12, 14A). Appellant, when he talked to the Customs Agents, said evidently Exhibit 3 had been properly marked and referred to other pieces of exactly the same merchandise (Tr. 23, 25). He further told them that Exhibits 7 and 8 were made in Japan (Tr. 21).

Miss Minkove, the salesgirl who worked for the company for about a year and a half, testified that Exhibit 1 (Count I) was of Japanese origin and the same merchandise as Exhibit 7. The portion of the label bearing the words "Made in Japan" was cut off with a scissors pursuant to instructions of the appellant (Tr. 36). In reference to Exhibit 2 (Count II) she said a gold label stating the origin of the article in Japan was removed in accordance with the same instructions (Tr. 38). This is the same merchandise as Exhibit 8. She said labels did not drop off and that they were taken off prior to going into stock (Tr. 46). Appellant told Miss Minkove that if anyone asked the origin of merchandise to state it was made anywhere except Japan. He also made the damaging admission to her. Didia told her if anything came up to tell the Customs Agents the labels were taken off by the girls employed at Christmas time (Tr. 43).

Arleen Rodgers (Tr. 46), Lenora Coogan (Tr. 47), Mary Lou Burns (Tr. 47), Rita Israel (Tr. 48),

Julia Levy (Tr. 49), and Mrs. Leyton Ross (Tr. 50), all testified that they were employed, or had been employed, at the New Linen Center where Mr. Didia was manager and Mr. Zagha was Assistant Manager, and that they received instructions from both of them to remove labels from merchandise made in Japan.

In addition, Customs Agents found 639 labels showing foreign origin in the store stockroom, a great number of which were "Made in Japan" labels (Tr. 21, 23).

All this was done with the very obvious intent on the part of appellant to deceive the public, contrary to the very design of the statute.

Under the circumstances, and the positive evidence in this case, there is no need of a discussion concerning the effect of an inference based on a presumption. Counsel states, on page 20 of appellant's brief:

> " 'Stated rather more accurately, the rule is to the effect that while the inferred fact may become the basis of another inferred fact, yet in the beginning of the line of inferences, there must be found a proven or known fact.' "

In this case it is obvious that we have more than one known fact. We have the admission—not denied

by the appellant, who took the stand—that the merchandise was made in Japan; the testimony of seven witnesses who testified that labels were removed under orders from appellant; the purchase of the merchandise without labels; the testimony about the labels on the merchandise; the exhibits themselves showing where they were labeled; the testimony of importers, and the finding of labels denoting foreign origin on the premises.

The prosecution has more than sustained its burden. 20 Am. Juris. Evidence, Sec. 1231:

> "The weight of authority now is that direct and positive proof is not essential; all the elements of the corpus delicti may be proved by presumptive or circumstantial evidence." Citing Perovich v. United States, 205 U. S. 86; St. Clair v. United States, 154 U. S. 134.

In *Cooper v. United States* (CCA 8), 9 F. (2) 216, the Court said (p. 224):

> "Conspiracy was excellently defined. It is practically always established by circumstantial evidence, and this method in no sense amounts to the building of one presumption upon another. The attack upon this ground is a novel one, which, if indulged, would grant immunity to conspirators in nearly all cases."

CONCLUSION

It is respectfully urged that the lower court committed no error in the instructions submitted to the jury, and that the evidence at the trial of the cause was sufficient upon which to base a conviction. The judgment should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney,
GERALD SHUCKLIN,
Assistant United States Attorney,
Attorneys for Appellee.